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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

APR 28 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Request for Expedited Declaratory
 Ruling Concerning the Territorial
 Exclusivity Rule, Section 73.658(b)
 of the Commissions Rules

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MB Docket No. 04-75

COMMENTS

Max Media of Montana LLC ("Max"), the licensee of television broadcast station KTGF, Great Falls, Montana, by its attorneys on February 25, 2004, filed with the Commission a Request for Expedited Declaratory Ruling ("Request") to terminate a controversy and remove uncertainty regarding the application of Section 73.658(b) of the Commission's rules to a certain arrangement between Sunbelt Communications Company ("Sunbelt") and the NBC Television Network ("NBC"). Specifically, Max outlined for the Commission a situation in which James E. Rogers, in his capacity as the controlling owner and President of Sunbelt and on behalf of a number of stations (the "Rogers Stations"),¹ entered into a multi-station network affiliation and territorial exclusivity arrangement (the "Arrangement") with NBC which violated the territorial exclusivity rule. On March 19, 2004, the Commission issued a Public Notice requesting

¹ Throughout this pleading, stations KBAO, Lewistown, Montana; KBBJ, Havre, Montana; KSWY, Sheridan, Wyoming; KCWY, Casper, Wyoming; KJWY, Jackson Hole, Wyoming; and KTVH, Helena, Montana are referred to collectively as the "Rogers Stations."

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comments on this issue.² These Comments are timely submitted in response to that Public Notice.

As stated in the Request, expedited action on the Request is necessary and in the public interest to avoid injury to competition in the community of Great Falls, Montana, and to resolve the dispute and controversy adversely affecting a multi-station sale with pending applications for Commission consent to the assignment of broadcast television licenses (the "Transaction").³ The extensive and unlawful territorial exclusivity granted to KTVH, Helena, Montana, under the Arrangement hinders KTGF's future access to NBC network programming in Great Falls. KTGF's current marketability has been impaired, thereby preventing its orderly divestiture to facilitate a pending broadcast station transaction. The Arrangement must be immediately declared a violation of Section 73.658(b) in order to prevent further injury to competition in Great Falls, Montana and to avoid irreparable harm to KTGF. Further harm to competition in Great Falls and to KTGF could be avoided if the Arrangement is declared a violation of Section 73.658(b) and further implementation of the Arrangement is required to cease before the deadline for contractual notice of the termination of KTGF's network affiliation agreement is given in July 2004.

There has been no opposition to Max's Request other than from Sunbelt, which obviously has opposed the Request because of the substantial exposure to liability of the Rogers Stations for willful violations of the Commission's rules, given the facts adduced by Max and

² "Comment Sought on 'Request for Expedited Declaratory Ruling' Concerning the Territorial Exclusivity Rule (Section 73.658(b) of the Commission's Rules)" DA 04-747 (released March 19, 2004), as modified by Erratum (released Mar. 24, 2004).

³ See FCC File Nos. BALCT-20030930AUQ and BALCT-20030930AVI. Max's affiliate, MMM License II LLC, is a party to that transaction – the proposed assignee – and has sought a temporary 180-day waiver of the duopoly rule to permit the orderly divestiture of station KTGF.

others in the Request. Logically, Sunbelt would want this entire matter to disappear and probably wishes that the 1999 letter from the NBC Television Network to James E. Rogers (the "1999 Letter") had never seen the light of day. However, the 1999 Letter is now before the Commission, and the fact of the 1999 Letter and the surrounding facts of the Arrangement cannot be ignored.

Sunbelt's Opposition, as supplemented on March 16, 2004, incorrectly asserted that Max in the Request alleged that Sunbelt had failed to file its network affiliation agreements for various stations with the Commission. In a footnote to the Request, Max merely explained that these documents were unavailable in the Commission's public reference room.⁴ No allegations were made by Max against Sunbelt for a failure to comply with the network contract filing regulation because Max was unable to determine whether the full and complete contract was ever filed with the FCC. Fortunately, Sunbelt's supplement contains a copy of the document Sunbelt filed in a failed attempt to satisfy the requirements of Section 73.3613 of the Commission's rules. It is clear that the document filed April 30, 2001, omits the critical and material information contained in the 1999 Letter from NBC. There is no indication that Sunbelt ever filed the 1999 Letter with the Commission, or that the information was incorporated into the network affiliation agreement as required by Section 73.3613 of the Commission's rules.⁵

⁴ See Request at note 3.

⁵ In pertinent part, Section 73.3613(a) requires the filing of "all network affiliation contracts, agreements, or *understandings* between a TV broadcast or low power TV station and a national network." [Emphasis added.] 47 C.F.R. § 73.3613(a)(1). Moreover, after May 1, 1969, the network contracts to be filed in satisfaction of this requirement were to "consist of a written instrument containing *all of the terms and conditions* of such contract, agreement or *understanding* without reference to any other paper or document by incorporation or otherwise." [Emphasis added.] 47 C.F.R. § 73.3613(a)(2).

In sum, the undisputed material facts before the Commission in the Request are not simply a case of a losing party in a contract negotiation trying to use the heavy arm of the government to influence the outcome. Indeed, the unfortunate fact is there have been no meaningful contract negotiations between NBC and Max regarding the renewal of the network affiliation agreement for KTGF. It has recently become clear that the termination of KTGF's network affiliation has been a *fait accompli* from the date of the 1999 Letter forward. Despite the subsequent assignment of the KTGF network affiliation agreement by NBC from the previous owner to Max (the new owner of station KTGF since March 1, 2001), NBC has not set forth any reason for termination of the KTGF affiliation related to Max or Max's operation of the station. However, NBC has made reference in writing to its pre-existing decision to give the affiliation to KTVH, Helena, Montana. Despite Max's continuing interest in discussing the renewal of KTGF's network affiliation agreement, NBC has declined to discuss the matter.

There is no doubt. The termination of KTGF's NBC network affiliation agreement is the direct result of the Arrangement, which violates the Commission's network territorial exclusivity rule. The sooner the Commission can declare the Arrangement a violation of Section 73.658(b) of the Commission's rules, the sooner competition can be restored to the community of Great Falls, and the sooner pending broadcast transactions affecting the community of Great Falls can go forward.

Respectfully submitted,

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April 28, 2004

CERTIFICATE OF SERVICE

I, Angela C. Spencer, do hereby certify that on this 28th day of April, 2004, a copy of the foregoing "Comments" was served by first class United States mail, postage prepaid, addressed to:

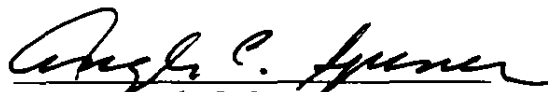
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